THE PORTO RICO TARIFFS OF 1899 AND 1900.

The sole object of this paper is to consider the lawfulness of the customs duties which have been and are to be levied by the United States Executive upon goods imported into the island of Porto Rico, and upon goods imported from that island into the States of this Union.

The tariff history of Porto Rico, since the American occupation, is already divided into three periods: First, that of the military occupation up to the exchange of ratifications of the treaty of peace between the United States and Spain on April 11, 1899; during which period the island remained without doubt a foreign country within the meaning of our domestic tariff act, while the President had an equally undoubted belligerent right to levy such contributions there as he saw fit.[1] Second, that between the treaty of peace and the taking effect of the Temporary Porto Rico Act[2] on May 1, 1900; during which period the Executive treated it as a foreign country, still held only by belligerent right, continuing the system of military contributions there, and collecting full duties at our home ports, under claim of authority under the Dingley Tariff act,[3] upon goods imported from the island. Third, the period now commencing.

It is not my purpose to discuss the general features of the new frame of government, which, while (if constitutional) denying to the islanders American citizenship, puts them under American tutelage and breaks off their past by abolishing even their own Castilian name for their country,[4] forcing them for the future, in legal documents, to substitute a word of Portuguese derivation. I shall confine myself to those portions which relate to duties upon imported and exported goods. These duties, less cost of collection, are to be devoted to the local purposes of the island. They are to continue only until other provision is made by the local legislature, and in no event after March 1, 1902. Disregarding provisions of no importance for the purposes of this paper, the provisions of the

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[1] Fleming v. Page, 9 How. 603, 614–6, and auth. cit.

[2] Signed April 12, 1900.

[3] Act of July 24, 1897 (30 Stat. 151.)

[4] Puerto Rico.

statute[5] are as follows: In general, foreign imports into Porto Rico shall pay the same duties as foreign imports into "the United States." Coffee, however, which enters our ports free of charge, is to pay a small duty; while certain other articles, dutiable here, are to be free. Commerce between Porto Rico and "the United States" is to be dutiable at fifteen per cent of the rates fixed by the Dingley Act.

The language is clear. It leaves nothing but the constitutional questions for judicial consideration, as to controversies arising in the future. It bears, indeed, upon certain controversies which have arisen in the past. It gives new legislative recognition to the obvious distinction between merchandise "coming into the United States *from Porto Rico*" and "like articles of merchandise imported *from foreign countries.*" It fully recognizes the obvious fact that, as language is ordinarily used, Porto Rico is not a foreign country, but a colony or dependency of the United States, since April 11, 1899. But the Dingley Act[6] levies no duties except upon "articles imported from foreign countries;" and if the language now used by Congress is accurate as well as clear, then all moneys collected by the Executive upon articles coming from Porto Rico, down to the very recent time when its proceedings were ratified by Congress,[7] were collected without authority of law. This question is an open one, but I shall confine myself to the discussion of purely constitutional controversies.

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[5] "SEC. 2. That on and after the passage of this Act, the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries: Provided, That on all coffee in the bean or ground imported into Porto Rico, there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: And provided further, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: And provided further, That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States. SEC. 3. That on and after the passage of this Act all merchandise coming into the United States from Porto Rico, and coming into Porto Rico from the United States, shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries * * * ."

[6] Act of July 24, 1897. (30 Stat. 151).

[7] Act of March 24, 1900.

In entering upon this discussion, it is necessary first to examine the precedents, judicial, legislative and executive. These have been analyzed with so much thoroughness by others,[8] that I shall state but briefly what seems to me to be the general bearing of those which do not specially relate to tariff questions, then taking up the latter more specifically.

There is doubt even as to the precise source of the power by which we govern Porto Rico. The Constitution gives Congress the power "to make all needful rules and regulations respecting the territory or other property belonging to the United States;" and in preparing one of his famous decisions, Chief Justice Marshall was evidently first of the opinion that this clause was the source of the power to govern territories acquired by treaty. Further reflection, however, led him to question the correctness of this assumption;[9] and there are many reasons to believe that the clause quoted relates only to territory which the Federal government owned or claimed to own in 1789.[10] If it is not applicable to territory subsequently acquired, then such territory is governed not by virtue of an express power, but by virtue of a power implied from the power to acquire new territory, itself implied from the power to make war and treaties, and to admit new States. It has never been necessary for the Supreme Court to decide the question. In either case the power is subject to no specially prescribed limitations. Whatever limitations it may have, if any, are to be found elsewhere in the body of the Constitution or amendments thereto.

What limitations may restrict our power to govern newly acquired districts has been often a subject of judicial discussion; and exaggerated weight is often placed by readers of such discussion upon remarks to the effect that the power of Congress is unlimited, remarks which were not intended to convey any further idea than that Congress in their case possessed not only the Federal powers, but those also which are exercised by

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[8] Besides the Congressional debates, special reference should be made to the argument of Prof. C. C. Langdell (12 Harvard Law Rev. 365) on the Imperialist side, and to those of Judge S. E. Baldwin (id. 393) and Mr. C. F. Randolph (33 *Congressional Record*, pp. 3791–9) opposed.

[9] American Insurance Co. v. Canter, 1 Pet. at pp. 542–3, 546.

[10] The fullest judicial treatment is in Dred Scott v. Sandford, 19 How. 393, 432–447, 500–515, 604–615, a case now discredited as to the precise point decided, but containing a large amount of very able and still valuable discussion, in the opinions of Chief Justice Taney and of Justices Campbell and Curtis. As showing the doubt belonging to this subject, see also United States v. Gratiot, 14 Pet. 526, 537; National Bank v. Yankton, 101 U. S. 129, 132.

a State within its own boundaries. Usually, the discussion has related to the applicability of those constitutional amendments which are commonly called the Bill of Rights. Certain judges have used language indicating that the inhabitants of these districts have no constitutional rights in the true sense of the word, and that whatever restrictions Congress may observe are moral, rather than constitutional, in character;[11] but such language has always been *obiter*, and opposed to the weight of judicial authority.[12] I think that we may consider it as settled, so far as anything which is disputed can be said to be settled, that those provisions of the Constitution and of the early constitutional amendments which prohibit infringement of individual rights are absolute prohibitions, unqualified by any restriction as to locality, and therefore operate as fully in the territories—that is, in the territories which we had acquired prior to 1898—as in the States. The language of the three last amendments throws no light upon the subject, for they were worded after this controversy had been long pending, and with a view of avoiding ambiguity.

Notwithstanding past authorities, however, it is contended by some that the question is still an open one. This contention is based upon the fact that every acquisition of territory prior to 1898 was accompanied by some treaty stipulation giving to the inhabitants of that territory the rights of United States citizens. It is contended that it has never been necessary for the decision of any case to consider whether newly acquired districts are protected by any self-operating provisions of the Constitution—that in every case the Constitution has been expressly extended over the district by the treaty-making power, and that this fact was sufficient to sustain the judgment of the court. To this contention the answer given is, that the Constitution is superior, not inferior, to the treaty-making power; that a treaty is but a law, which can be repealed; that if the Constitution were introduced only by force of a treaty

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[11] Benner v. Porter, 9 How. 235, 242; Mormon Church v. United States, 136 U. S. 1, 44; and see also *dubitante*, McAllister v. United States, 141 U. S. 174, 188; American Co. v. Fisher, 166 U. S. 464, 468. Endleman v. United States, 86 Fed. Rep. 456, 459, merely quotes, without necessity, the *dicta* of the Benner case.

[12] Murphy v. Ramsey, 114 U. S. 15, 44, 45 and cas. cit.; Ex parte Bollman, 4 Cranch 75; Reynolds v. United States, 98 U. S. 145, 154; Callan v. Wilson, 127 U. S. 540, 550; Thompson v. Utah, 170 U. S. 343, 346; Springville v. Thomas, 166 U. S. 707; Capital Traction Co. v. Hof, 174 U. S. 1, 5; and see Wong Wing v. United States, 163 U. S. 228, 238.

provision, it might be taken away again by a subsequent statute; that if the Constitution did not exist of its own force in any given district, a law (whether in the form of treaty or statute) declaring it to exist would amount to no more than a provision that its principles should govern until the legislative or treaty-making power should otherwise enact; and that such a law would be in so far repealed if any subsequent legislation should be in conflict with it. That a treaty provision is repealed by subsequent statute, is no longer a matter of doubt.[13] If we promise a foreign power upon cession of territory that we will give to it, or to its citizens, or to the inhabitants of the territory, any specified right, privilege or immunity, we may break our promise, and as a general rule our courts cannot intervene. The breach of the promise would be a *casus belli;* but it would raise a political, not a judicial question. To this answer the imperialists reply, however, that some treaty provisions are self-executing, and so vest rights which cannot be taken away by subsequent legislation; that (as they claim) the provisions of our former annexation treaties are of this character; and that the judicial decisions upon the operation of the Constitution in districts thus ceded should be based upon this ground. It is undoubtedly true that a treaty, like a statute, may be so worded as to vest rights by its own inherent force, without the aid of any subsequent legislation or judicial proceedings. It may vest title to lands, so that they cannot be taken away afterwards without just compensation. It may operate as a general naturalization law, giving to the inhabitants of a ceded territory the full rights of American citizens. Whether the past judicial authorities upon the question of the application of the Bill of Rights in our territories will be absolutely controlling upon cases arising in Porto Rico, or whether each will have merely the weight due to a carefully considered judicial opinion upon a point not necessary to the decision of the case under consideration by the court, will depend upon the construction of certain treaty provisions.

Moreover, it is arguable that the absolute prohibitions upon legislative action which are contained in the Bill of Rights might be held applicable to our new possessions, without its necessarily following that the clauses in the original constitution restricting the legislative power of taxation are equally

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[13] Whitney v. Robertson, 124 U. S. 190; Chinese Exclusion Case 130 U. S. 581.

applicable, especially the clause requiring certain forms of taxation to be uniform throughout the United States.

On the other hand, there are grave reasons for holding this "uniformity clause" applicable to the territories, which do not exist in the case of the other prohibitions. Such a holding may be necessary for the protection of the States, which are entitled to demand that the duties levied upon them shall be no greater than those levied in the districts immediately under the care and at the expense of the whole nation. This is no fanciful illustration. Already there are exemptions granted to Porto Rico which are not conceded to the States, while it is seriously proposed, as a means of maintaining the policy of the "open door" in the Far East, to permit entry of foreign goods into the Philippines at rates far below those charged in the ports of our States. It is admitted by most administration leaders that what can be done in the Philippines can be done in New Mexico and Arizona; and, therefore, if the uniformity clause does not apply to the commerce of the territories, Congress might encourage the trade of New Mexico and Arizona at the expense of the trade of California and Texas. The danger here may be slight; but it was the precise danger feared by the framers of the Constitution.

I will now consider the precedents bearing directly upon the right of taxation in organized or unorganized territories of the United States, taking them up—whether they be judicial, executive or legislative—in their chronological order; but without cataloguing the diverse views of individual statesmen, journalists and counsel, from time to time.

Much stress has been laid upon the fact that our first Customs Administration Acts[14] provided no machinery for the collection of duties upon merchandise imported into the territories; and this has been spoken of as if it were a contemporaneous practical construction of the Constitution, proving that duties were not expected to be uniform except among the States themselves. This supposition is due to imperfect knowledge of the provisions of those acts Neither of the territories then existing bordered upon the sea; and the only port where merchandise was permitted to be imported otherwise than by sea was the port of Louisville in the State of Virginia (later of Kentucky).[15] This was indeed a discrimination in favor of a single

[14] Act of July 31, 1789 (1 Stat. 29); Act of August 4, 1790 (1 Stat. 145).
[15] 1 Stat. 48; Id. 177.

port, but it was a discrimination permitted by the Constitution,[16] and hence there could not lawfully be any duties in the territories to collect.

It has also been urged that under our first excise laws no tax collectors were provided for the territories. This fact is entitled to consideration, although it is probably susceptible of explanation without affecting any constitutional argument. The first excise was a provision inserted in a tariff law, to be collected by the machinery provided for collection of certain tariff duties;[17] and tariff duties, as I have pointed out, were not operative in the territories because nobody could import goods there. Our early excises would very likely have given no return sufficient to warrant the establishment of any machinery for collection there; and even if the omission to provide for collection bureaus in the territories was deliberate, we should wish to know the motive before giving a constitutional interpretation to what may have been merely good fiscal management.

In 1799, when the territories had begun to be commercially important, the machinery for collection of duties was extended to include them;[18] and they have been included practically, as well as theoretically, in the operation of the uniformity clause ever since.

During the first decade of our constitutional history, however, we find a most striking confirmation of the theory of the applicability of this provision to the territories, in the corresponding provision concerning naturalization. Elsewhere in the Constitution Congress is empowered "to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States." The first naturalization law was passed by the First Congress, in 1790, and conferred its benefits upon all aliens who for the prescribed periods "shall have resided within the limits and under the jurisdiction of the United States." It, however, assumed that the alien would have resided in "one of the States," the Northwest Territory being then so sparsely populated that it was evidently overlooked.[19] In 1795, however, a new naturalization law was passed, with a preamble stating that it was "for carrying into complete effect the power given by the Constitution to establish an uniform rule of naturalization throughout the United States." This act gave the naturalizing power to the

[16] Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 435.

[17] Act of March 3, 1791 (1 Stat. 199, 200).

[18] Customs Administration Act of March 2, 1799 (1 Stat. 627. 637–9).

[19] Act of March 26, 1790 (1 Stat. 103).

courts "of the States or of the territories Northwest or South of the River Ohio"; and provided that the applicant should have "resided within the United States five years at least, and within the State or territory where such court is at the time held, one year at least." The alien cannot be naturalized unless the court is "satisfied that he has resided within the limits and under the jurisdiction of the United States five years" and is "attached to the principles of the Constitution of the United States."[20] We have thus an almost contemporary construction of the meaning of these uniformity clauses; and the weight of such a construction must be almost, if not quite, conclusive.[21] The first bankruptcy law contains some language inapplicable to the territories, and is to be administered by judges of the district courts of the United States.[22] Whether this term includes the territorial courts of that time[23] does not seem to have been decided, and I am not informed of the practice under the act. It was very soon repealed,[24] so that the matter, in view of the then sparse population of the territories, is of no great weight.

New questions arose with the treaty of 1803, by which Louisiana was ceded to the Union. That treaty provided that for a period of twelve years goods imported into Louisiana in French and Spanish vessels, coming from ports of their own countries, should pay no greater rate of duties than goods imported in vessels of the United States.[25] The treaty provoked memorable debates in both Houses of Congress upon the constitutional questions involved. It brought up for the first time the question of our right to acquire new territory, as well as the question how the new territory could be governed. The debates were very short, however, since there was need of most immediate action. The constitutional discussion in the House of Representatives occupied a single day; and not until it was half over did Roger Griswold, a Federalist leader in Connecticut, raise the point that the special privilege to French and Spanish vessels was a violation of the uniformity clause of the Constitution, since the treaty provided that Louisiana should be part of the United States, so that the duties there paid should be uniform with those paid elsewhere.[26] The point received

[20] Act of January 29, 1795 (1 Stat. 414).
[21] The Laura, 114 U. S. 411, 416.
[22] Act of April 4, 1800 (2 Stat. 19).
[23] See 1 Stat. 51; 2 Stat. 90.
[24] Act of December 19, 1803 (2 Stat. 248).
[25] 8 Stat. 204.
[26] Annals of Congress, October 25, 1803, pp. 463-4.

little attention, and the treaty was approved by an overwhelming majority. In answer to another and clearly untenable constitutional objection to the same treaty provision, while some administration leaders denied that the commerce of the new territory would be subject to the Constitution, John Randolph of Virginia took the ground that this special privilege was defensible, because it was part of the price which we paid for the territory, which came to us subject to a restriction; but that if it violated the Constitution, a remedy could be found by giving the French and Spanish vessels a similar twelve years' privilege in our other ports.[27] The last point was certainly a good one. The treaty provision was subsequently confirmed by statute; and the fact that no French or Spanish importer claimed the benefit of the Constitution in any of the ports of the older States is entitled to no practical weight, as customs cases did not find their way into our courts until long after the expiration of this period.[28] Too great stress can easily be laid on such omissions. Even now there is a plain violation of the uniformity clause on our statute book which has stood there for nearly thirty-five years without question, so far as I am informed.[29]

Possession of Louisiana, under this treaty, was not taken until December 20, 1803. It was announced to Congress on January 16, 1804. The act extending our customs revenue system to Louisiana was approved February 24, and went into effect thirty days later, or about three months after the new territory came actually into our control.[30] During this period the Treasury Department seems to have ruled that imports therefrom were subject to duty.[31] The amount of these imports must have been but small. The Secretary of the Treasury, Albert Gallatin, was not a lawyer, although a most able financier; and he was struggling with most important and intricate questions relating to the fiscal management of the new possession. His omission to raise and sustain the constitutional point is a precedent for the Imperialists, for what it may be worth.

Florida was the next addition to our possessions. The treaty of cession was ratified February 19, 1821. It contained a twelve years' privilege like that of the Louisiana treaty.[32]

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[27] Id., pp. 437-8, 456-7.

[28] The right to recover duties overpaid was not established until 1836 (Elliott v. Swartwout, 10 Pet. 137).

[29] Rev. St., Sec. 3114.

[30] 2 Stat. 251, 254.

[31] 1 Mayo 104; but see Cross v. Harrison, *infra*.

[32] 8 Stat. 262.

The temporary act extending our customs revenue system over the new territory was approved March 3, 1821.[33] This act recognizes Florida as part of the United States, and conforms to the uniformity clause of the Constitution. Possession had not yet been taken. The question subsequently arose whether Florida became actually a part of the United States for revenue purposes when the treaty was ratified, or when possession was delivered. Attorney General Wirt in the case of The Olive Branch[34] ruled upon the latter theory, holding goods dutiable which were shipped from St. Augustine on July 14, 1821, possession not having been delivered until July 17.

In 1820, during the period between the signing and the ratification of the Florida treaty, the case of Loughborough v. Blake[35] came before the Supreme Court. It raised the question whether Congress had the right to impose a direct tax upon the District of Columbia. It was not necessary to the decision of this case to decide whether the uniformity clause of the Constitution applies to the territories and the District of Columbia. That question was, however, considered by Chief Justice Marshall, and he gave the weight of his great name to the proposition that the words "United States" in the uniformity clause include not merely the States, but the whole "of the American Empire."[36] This was only a *dictum*, but it was a *dictum* of high authority.

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[33] 3 Stat. 639.

[34] 1 A. G. Op. 483.

[35] 5 Wheat. 317.

[36] "This grant [of the taxing power] is general, without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are "but all duties, imposts, and excises, shall be uniform throughout the United States." It will not be contended, that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States." (5 Wheat. at pp. 318–19.)

In March, 1845, Congress passed a joint resolution for the annexation of Texas, then an independent republic. The matter remained executory at the time of the final adjournment of Congress. The question was raised during the summer, whether goods imported from Texas were dutiable. Robert J. Walker, Secretary of the Treasury, held that they were dutiable until further action by Congress, although the resolutions had been approved by the Texan Government.[37] The Supreme Court afterwards held that the date of the admission of Texas to the Union was December 29, 1845,[38] thus impliedly sustaining the Secretary's decision.

California was ceded to the Union by the Treaty of Guadalupe Hidalgo, ratified May 30, 1848. It was then held in military possession. The cession was not made in express words, but impliedly by readjustment of the boundary line.[39] Congress was in session at the time, but adjourned without providing for the extension of the customs revenue system over the newly annexed territory. It recognized the fact of annexation only by establishing mail routes and providing that two postal agents should go out to California and organize the postal system there.[40] The question was thus squarely presented to the Executive Department for consideration, whether duties were properly leviable upon imports from newly acquired territories, as to whose revenue matters Congress had not yet legislated, into the States of the Union; and also whether, under the language of the tariff law (which so far as material was then the same as now)[41] the same rates of duties must be levied in California as in the States. President Polk and his Cabinet evidently examined the constitutional questions with the greatest care. They decided, and Secretary Buchanan announced to the people of California through one of the postal agents, that the government by belligerent right had ceased upon the ratification of the treaty of cession; that the former military government thereafter continued in power as a *de facto* government, until Congress should otherwise provide; that the war tariff, which had been established by that government in California, had been superseded by the general tariff law; and that no duties were leviable on goods imported from California into the

[37] 1 Mayo, 375.

[38] Calkin v. Cocke, 14 How. 227.

[39] 9 Stat. 926, 929.

[40] 9 Stat. 320.

[41] Levying duties on "all articles imported from foreign countries" (9 Stat. 42).

States.[42] This was but a decision of the Executive Department, but it was very carefully considered, and is entitled to some weight. I know of no evidence that the slavery question had anything to do with it.[43] It is especially interesting, because there was no language in the treaty, and no legislation by Congress, which provided for the immediate extension of the Constitution over the new territory.[44] Even the promise to give its inhabitants the rights of citizens was an executory one.[45]

At the December term, 1849, the Supreme Court decided the famous case of Fleming v. Page,[46] so much relied upon by the Imperialists. The point decided was a simple one, and the ground of decision indisputable. During the Mexican war we held the Mexican State of Tamaulipas in military occupation for a long period. During that period certain goods were imported from that State into Philadelphia, and were there claimed to be free from duty on the ground that Tamaulipas was a part of the United States. It was undoubtedly a part of the United States for many purposes in theory of international law.[47] The court very properly held, however, that the President, as Commander-in-Chief of the armies of the United States, had no constitutional power to extend the boundaries of the country; that this could be done only by act of Congress or by treaty; and, therefore, that under our Constitution the State of Tamaulipas was still to be regarded as a foreign country. Chief Justice Taney went on, however, to make some entirely unnecessary remarks about the practice of the Treasury Department in regard to the cessions of Florida and Louisiana;

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[42] Quoted in Cross v. Harrison, 16 How. at pp. 184–5.

[43] The peculiarity and the error of Calhoun's doctrine was not that it made the Constitution at once operate in new territory, but that it read into the Constitution a guaranty of the institution of slavery. The weakness of his opponents' position was that they went too far, and sacrificed the constitutional guaranties which did and do exist.

[44] It is a misapprehension to suppose that international law prevents the Constitution from operating in ceded territory until Congress legislates. International law is not law at all in any land except so far as it is a part of the municipal law of that land, and, like our statutes, it is subordinate to the Constitution, which comes into operation at once. "Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government." (Pollard's Lessee v. Hagan, 3 How. 212, 225; Chicago, Rock Island, etc., Ry. Co. v. McGlinn, 114 U. S. 542, 546.)

[45] 9 Stat. 930.

[46] 9 How. 603.

[47] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch, 191; The Foltina, 1 Dod. 450.

remarks which, so far as applicable to the tariff question, seem plainly erroneous. He says that after the United States had taken possession of Pensacola under the Florida cession, goods imported from that port "before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty." But, as we have seen, Congress had made these necessary provisions before the United States took possession. The Chief Justice's statement seems to be taken from Secretary Walker's Texas circular above referred to;[48] but the ruling therein discussed is there stated to have been made in 1819, when somebody seems to have made the untenable claim that Florida was part of the United States because the treaty had been signed, although it had not yet been ratified. The Chief Justice goes on to say that the decision which he refers to "was sanctioned at the time by the Attorney General"; but there is no such ruling to be found in the printed reports of the Attorney General's opinions. There is some ground for belief that the Chief Justice was making a mistaken reference to the case of the Olive Branch.[49] The Chief Justice's further remarks relate to the Treasury practice in granting clearances in the coasting trade; and this is immaterial for our purposes, since the constitutional provision against preference to the ports of any State has clearly no operation in a territory.

Cross v. Harrison[50] involved the legality of the duties collected by the California *de facto* government between the date of the treaty of cession and the date when the regularly appointed collector of customs entered upon the duties of his office. It was an action brought against the *de facto* collector to recover duties paid to him under protest. The duties collected, as I have stated, were at the rates provided in the local war tariff up to the date when news of the ratification of the treaty of peace reached California, and after that time at the rates provided by the general tariff law of the United States. Mr. Justice Wayne, in the opinion of the court, recites at length the proceedings of the Polk administration in California after the treaty, quoting at length from the constitutional arguments of Secretary Buchanan to the effect that California was under a *de facto* government, succeeding the government based upon belligerent right, and that it was part of the United States within the

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[48] 1 Mayo 375.

[49] See remark of Daniel Webster, 9 How. at p. 613.

[50] 16 How. 164.

meaning of the tariff clause of the Constitution. He also quotes Secretary Walker's ruling that the Treasury Department had been given no power to collect duties in California, so that their collection had to remain in charge of the War Department, which was conducting the *de facto* government. The court decided that the imposition of the regular duties, as soon as the fact of the cession of California became known, was rightful and correct; that it was perfectly proper to collect duties under the local war tariff until the fact of cession was known; that the landing of goods free of duty at any place out of a collection district "would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises shall be uniform throughout the United States"; that "the ratifications of the treaty made California a part of the United States; and that as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right"; and that Congress has since ratified all of the acts of the *de facto* government, including those of the Collector. Counsel for the importers claimed that it had not been the practice of the United States to collect duties in such cases until Congress had legislated, citing the Fleming case, and also relying upon the precedents of Louisiana and Florida.[51] Mr. Justice Wayne, after discussing the latter precedents, says that "there was no interval in either instance where duties were not collected upon foreign importations, because Congress had not legislated for it to be done."[52]

Much of the argument in Cross v. Harrison was not necessary to the decision. The case might have been disposed of by saying simply that Congress had ratified everything done, and that the constitutional question was immaterial, because the voluntary action of the Executive had directed precisely what the Constitution, if applicable, would have required. But it still remains true that the deliberate decision of the Polk administration upon this constitutional question was carefully and thoroughly reviewed, and fully approved, by a unanimous decision of the Supreme Court rendered after a most elaborate argument, and in view of all the legislative and executive precedents; and rendered in the case of a still unorganized territory, which was protected by no self-operative treaty provision

[51] 16 How. at pp. 174-6.

[52] Id. at p. 200.

or statute. While such a decision is not absolutely controlling, it shows the weight of authority to be altogether on the side of those maintaining that the uniformity clause, at least, of the Constitution, extends *proprio vigore* over all territory ceded to the United States.

In 1868, immediately after the cession of Alaska to the United States, the principle of Cross v. Harrison was followed by the Treasury Department without question,[53] and goods shipped from Alaska to our ports were therefore held entitled to admission free of duty.

The present administration has reversed the California precedent. No judicial decision upon its action has as yet been procured. The Board of General Appraisers, a *quasi* judicial tribunal in the Treasury Department, has written an opinion upon the subject, sustaining the action of the administration;[54] but the opinion seems to me to be based upon a misunderstanding of the historical precedents, and unless a recent well known opinion of the Supreme Court[55] is to be overruled in principle, the Board was altogether without jurisdiction in the premises, since the importers who brought the case before it had to concede for the purposes of the case, by so doing, that the Island of Porto Rico was a foreign country, which was the only question for decision.

In discussing the application of the uniformity clause of the Constitution to special cases which have come up from time to time, where the existence of uniformity has been challenged, justices have used expressions in opinions to the effect that the requirement of uniformity, while held by them to be geographical in character, requires only that the rate of duty should be no greater in one State than in any other State, and similar expressions have been used by constitutional writers.[56] In the cases referred to, however, no question was raised as to the operation of these taxes in the territories; all duties, imposts and excises, on the other hand, since the beginning of our

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[53] Syn. Dec. Treas. Dept. 1868, pp. 10, 20.

[54] Syn. Dec. Treas. Dept., Feb. 14, 1900. No. 22018.

[55] In re Fassett, 142 U. S. 479, 487.

[56] Income Tax Case, 5 D. C. App. at p. 421; 157 U. S. at p. 593; 1 Story on the Constitution, § 957. Discrimination between States was doubtless the main evil aimed at, but Mr. Justice Story, who first pointed this out, also gives his full endorsement to Loughborough v. Blake (§ 999), and we shall see that the framers of the Constitution felt under the fullest obligation to treat the inhabitants of the then existing territory upon an equal footing with those of the States.

government, have been laid upon States and territories alike; and the use of the expressions which I have referred to, being sufficient and entirely proper so far as the disposition of the cases then before the courts were concerned, cannot properly be regarded as having any controlling influence upon a question not before the court.[57] "We take it to be a sound principle that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made."[58]

Stress has been laid by some upon the fact that there are so many clauses in statutes and treaties extending the laws of the United States to newly acquired territory, and extending the rights of United States citizens to their inhabitants. Little weight can properly be attached to such clauses. It is very proper to insert them for greater caution, and if the absence of a constitutional right, unless expressly granted by law, could be inferred from the fact that it is common to specially recognize it in drafting statutes, our constitutional system would be thrown into considerable confusion.

Thus much for the past precedents. So far as they go, their weight is against the Imperialist theory, and in favor of the position that Porto Rico upon April 11, 1899, became a part of the United States, at least enough so, to entitle it to the benefit of the uniformity clause of the Constitution. Let us now assume, however, that they will be distinguished upon the ground that they are sustainable upon special treaty provisions of those times, or upon other grounds not material to the present controversy. Let us then examine the questions raised by the Porto Rico tariffs as original questions, uncontrolled by precedents, and to be solved by an examination of the Constitution itself.

It is now often said that the Constitution does not extend to Porto Rico. This is certainly an inaccurate form of expression. Neither Congress nor the Executive has any lawful power anywhere except from the Constitution. The sovereignty of the United States resides in its people, not in its officials. When the President as Commander-in-Chief invades a foreign country, he is bound only by the limitations of civilized warfare, but that is because the people, through the Constitution, have given him a power subject only to those limitations. He

[57] Pollock v. Farmer's Loan and Trust Co., 157 U. S. at pp. 574–5 and cases cited.

[58] Woodruff v. Parham, 8 Wall, 123, 133.

conducts courts in semi-civilized countries, putting criminals to death without benefit of jury; but while the Bill of Rights does not operate there, where the sovereignty belongs to a foreign ruler under whose permission the courts are organized, the President's acceptance of that permission is by authority from us, speaking through the Constitution. If the flag goes anywhere without the Constitution, it goes unaccompanied by any authority from the people of the United States.

The Constitution does extend to Porto Rico. Implied powers under the Constitution are the sole authority for our government there, and the sole authority for the taxes which we have paid to maintain that government. The problem to be solved is not whether the Constitution extends there, but which of its provisions are operative to restrict legislative and Executive action in regard to the island and its inhabitants.

The questions thus to be solved are as follows: First, whether goods imported from foreign countries into Porto Rico can be subjected to duties for the benefit of the United States Treasury, at rates different from those levied upon goods imported from foreign countries into the States of the Union; second, whether goods imported from Porto Rico into the States of the Union can be subjected to the payment of duties to be covered into the Treasury of the United States; third, whether goods imported from the States of the Union into Porto Rico can be so subjected; fourth, (if the answer to the previous questions be in the negative), whether these various duties are validated by being covered into the local treasury of Porto Rico, instead of into the general treasury of the United States.

The answer to the first question depends upon the construction of the following constitutional provision: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and the general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The last clause of this provision is commonly called the "uniformity clause" of the Constitution. It will be noticed that the clause is not entirely independent, but a limitation upon the taxing power. What is the meaning of "United States" in the uniformity clause? Plainly, it seems to me, the same as the meaning of "United States" in the clause preceding. Whatever variation may or may not exist in the meaning of "United States" in other portions of the Constitution, or of the amendments thereto, I think that it would be an unjust reflection upon the draftsmen of that instrument to say that

they were guilty of using it twice in this paragraph with different meanings. What, then, is the "United States," throughout which all duties, imposts and excises shall be uniform? Plainly, it seems to me, the same "United States" for whose common defence, and for whose general welfare, Congress may exercise the taxing power. If Porto Rico is not so far within the United States that duties levied there must be uniform with those levied elsewhere, then it is no part of the "United States" which Congress may tax us to defend. The word "throughout" shows that the "United States" for whose welfare taxation can be imposed, is not a mere intangible idea—a mere personification of the national sovereignty—but a geographical as well as a political fact; that it is something which can be pointed out upon a map; and I think that the map upon which it can be pointed out is what we hang upon our walls and call the map of the United States. Nor do I think that the meaning of the Constitution must now be changed, just because our boundaries have become too extended and too complicated to be conveniently shown upon a single map.

And here I may allude to what seems to me a very singular misapprehension of one of the ablest of Imperialist constitutional lawyers.[59] If territory annexed becomes a part of the United States, he asks "where is to be found the power to dispose of it," saying that it could no more be ceded to a foreign country than one of the States could be. I answer, first, that if the territorial clause of the Constitution applies to territory acquired since 1800, then there is an express power to dispose of it; second, that in any case the power to acquire territory implies the power to dispose of it; third, that even a portion of a State can be ceded to a foreign government if the State gives its consent that the cession be made.[60] This would not, of course, deprive the inhabitants of the ceded district of their election to retain United States citizenship.

It is an interesting fact that, while duties, imposts and excises are to be "uniform throughout the United States," direct taxes are to be "apportioned among the several States," thus not making it obligatory upon Congress to impose that class of taxes upon the territories also. This distinction was noticed by Chief Justice Marshall; and while holding that

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[59] John C. Spooner in the Senate, April 2, 1900.

[60] See Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 541; Geofroy v. Riggs, 133 U. S. 258, 267, referring to the cession of a part of Maine to Great Britain in 1842, to settle a boundary dispute.

direct taxes might be levied in the territories at the option of Congress, he suggested as a reason for not having made the extension of every general direct tax to the territories obligatory upon Congress, that the cost of collection of such tax might be greater than the amount collcted.[61]

It is altogether probable that the framers of the Constitution had the territories in mind in the drafting of these sections. The Northwest Territorial Government was established by the Continental Congress by the famous Ordinance of July 13, 1787,[62] and was known to the Constitutional Convention shortly thereafter. The Ordinance declared itself to be a "compact between the original States and the people and States in the said territory," [63] unalterable except by common consent; and it specially provided that the inhabitants of the territory should be subject to pay their share of the debts and expenses of the Federal Government, "to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States." [64] However deficient the power of the Continental Congress to enter into this compact may have been, it was regarded by all as sacred, and was promptly confirmed by the first Congress under the Constitution.[65]

Comparison with other clauses of the Constitution tends to confirm the view that the "United States" as used in the taxing clause includes the entire territory for whose defense and welfare the Federal Government is established, whether or not that territory may be within the limits of a State. The phrase "citizen of the United States" appears frequently in the Constitution, and it has never been seriously doubted until of late that a decree of naturalization, which constitutes one a citizen of the United States, may be granted in a territory, and may thus constitute one a citizen of the United States who is not a citizen of any State.[66] The power of naturalization is also contained in a "uniformity clause." That this uniformity must prevail throughout the territories, as well as throughout the States, I have already shown to be the settled practical construction of the Constitution.

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[61] Loughborough v. Blake, 5 Wheat. at p. 323.

[62] 1 Stat. 51, note; Rev. St., ed. 1878, p. 13.

[63] Ordinance of 1787, § 14.

[64] Ordinance of 1787, Article IV.

[65] 1 Stat. 50.

[66] This was conceded in the Louisiana debate of 1803 by one of the administration leaders of the Senate, the famous John Taylor of Carolina.

Much has been made by the Imperialists of the ruling originating with Chief Justice Marshall,[67] and since steadfastly adhered to, that the territorial courts are not organized under the judiciary article of the Constitution, so that it is not necessary that their judges should hold their offices during good behavior. The foundation of this ruling must be found, however, in the peculiar language of the judiciary article. That article does not require that all the judges of courts of the United States should hold office during good behavior. It provides that the "judicial power of the United States" should be vested in certain courts, the tenure of whose judges should be as stated. It then proceeds to define this "judicial power," and its definition excludes a very large class of cases arising in the territories—such as common law and equity cases arising there, which are not founded upon any provision of statute or treaty. Evidently, therefore, the courts established by the judiciary article are not sufficient to give the requisite protection to inhabitants of the territories or of the District of Columbia; and their protection must be found in the general and exclusive power of Congress to legislate in all their matters. The ruling of the Supreme Court upon this point has not been regarded by the majority of subsequent rulings of that court as excluding the territories from the protection of other clauses of the Constitution.

Mainly for the above reasons, I believe that the uniformity clause of the Constitution should be construed to apply to Porto Rico, as well as to Connecticut or New York; and that whatever duties are levied in New York upon goods coming from foreign ports should be equally levied in Porto Rico, and devoted to the common defence and general welfare of the whole United States, although they may of course be specially appropriated for the benefit of Porto Rico.

If, then, Porto Rico be part of the United States within the uniformity clause of the Constitution, it follows that the second and third questions must be answered in the negative, as well as the first. Duties are not uniform throughout the United States if they are levied upon commerce between the States and Porto Rico, while they are not levied upon commerce between the States and Arizona or Alaska.

Even were Porto Rico no part of the United States, an article "imported from the United States" into the island, as the sec-

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[67] American Insurance Co. v. Canter, 1 Pet. 511.

ond section of the new law puts it, would not be dutiable. Its departure from our coast and arrival at the island are parts of a single commercial transaction. While it is an import there, it is an export here. By a plain and express constitutional prohibition, "no tax or duty shall be laid on articles exported from any State"; and it has been well said that "the United States cannot, by transferring the place of collection, change the character of the tax that may be levied and collected." [68]

Hence the article is not taxable if it is exported from any State within the meaning of the prohibition. It certainly is an export from a State in the ordinary meaning of the English language, whatever kind of a dependency Porto Rico may be; and there is no doubt that all exports to foreign countries are within the prohibition. The Executive, by ruling Porto Rico to be a "foreign country" within the meaning of the Dingley Tariff Act, hence put itself in the position of violating an express prohibition in the Constitution of the United States every time that it collected these duties in Porto Rico—a prohibition which undoubtedly applied to the case, for it was the rights of a State, not a territory, which were infringed.

If, however, Porto Rico is not a "foreign country," and if on this account the export clause is inapplicable, then it follows, under the authorities, that Congress has not received the power to tax this branch of commerce. There are no decisions in point under the clause prohibiting Congress from taxing exports, but there is authority upon the clause placing a similar prohibition upon the States. This clause came up for examination in 1860 in Almy v. California,[69] a case involving a State tax affecting articles exported from California to New York. It was objected to as a regulation of inter-State commerce and as a tax upon exports. So able a counsel as Judah P. Benjamin seems to have conceded that the articles were exported within the meaning of the Constitution, endeavoring to evade the prohibition by arguments immaterial here. The Supreme Court unanimously held them to be exports and based their decision upon that ground alone. In 1868 a similar question came up again in Woodruff v. Parham,[70] which overruled the former case upon the point decided (one justice strongly dissenting) and held that goods exported from one State to another are

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[68] William Lindsay in the Senate, March 9, 1900; compare Brown v. Maryland, 12 Wheat. 419, 437, 440; Woodruff v. Parham, 8 Wall. 123, 132.

[69] 24 How. 169.

[70] 8 Wall. 123.

not exports within the constitutional prohibition. The reasoning of the court, however, is as fatal to the tax which we are considering as if it had sustained the Almy case. The point was, of course, urged, that if goods sent from one State to another are not "exports," then Congress has power to tax inter-State commerce to any extent. Mr. Justice Miller, however, replied that Congress has no right to tax exports of any kind except under its right to levy "imposts"; that the word "imposts," as used in the Constitution, gives no right to lay duties on inter-State commerce; that hence "we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts." [71] Hence this dilemma: If Porto Rico is "abroad," to be ranked among "other countries," the tax on exports thereto is expressly forbidden. If Porto Rico is not "abroad," among "other countries," then the tax is void for lack of power.

The fourth question still remains for examination—whether Congress has remedied any of these defects by turning the proceeds of taxation into the local treasury of Porto Rico, to be expended for local purposes.

The uniformity clause of the Constitution is in form a limitation upon the clause which grants a taxing power "for the common defense, and general welfare of the United States." [72] Congress has an independent taxing power in the territories and District of Columbia, to be exercised for local purposes.[73] Is the uniformity clause to be construed as a limitation upon this local power of taxation also? I do not think that this is a necessary construction. If, in addition to the uniform duties, imposts and excises, which operate throughout what Marshall called "the American Empire," Congress shall impose duties as well as direct taxes, to be collected in the territories and devoted to the necessities of their government, I do not see that the uniformity clause is violated. The main resource of our territorial treasuries has always been direct taxation; but they thrive also upon a system of license fees upon occupations, which are duties or excises,[74] which could not be levied by

[71] 8 Wall. at p. 132.

[72] The debts referred to in the same sentence are the debts incurred prior to 1789, which have long since been paid.

[73] Loughborough v. Blake, 5 Wheat. 317.

[74] See Ficklen v. Shelby County, 145 U. S. 1, 23-4; Pollock v. Farmers' Loan and Trust Co., 157 U. S. at pp. 576-8, and cas. cit.; Woodruff v. Parham. 8 Wall. 123, 133.

Congress in a single State, but whose constitutionality has never been doubted, so far as I am aware.

Hence I can not perceive that the five per cent. duty on coffee, levied in Porto Rico for local purposes, is a violation of the Constitution, although coffee is admitted free of duty into the States of the Union. The exemption of Spanish and English literature, however, so far as it is not shared by the States, seems to be unconstitutional and void; for Congress can not make imposts lighter in territories than in States. The immediate covering of the foreign import duties into the local treasury of the island seems to be unobjectionable. Under the uniformity clause they must be regarded as collected for the common defense and general welfare, but if they were forwarded to the national treasury, they could be at once appropriated for Porto Rico and sent back again—a useless circuity.

But taxation of imports from the States of the Union into Porto Rico is of very questionable validity, whatever be done with the proceeds collected, and whether or not the island be part of the "United States." The prohibition against taxation of exports is not in form a limitation upon any particular grant of power. It is an absolute prohibition, without exceptions. Now it has never been held that either Congress or a State can tax exports to a territory. The courts have only considered the cases of inter-State and foreign commerce. It is altogether probable that the doctrine of Mr. Justice Miller will be adhered to by the Supreme Court, and applied to the clause prohibiting the taxation of exports by Congress, although perhaps not absolutely impossible that the court may retrace its steps and apply the older doctrine. It is altogether probable, in other words, that the court will never apply the prohibition to inter-State commerce, nor yet to commerce between the States and the immediately contiguous territories. The restricted meaning thus given to the word, however, is based upon its common usage; and I think that few would ever have hesitated to say that goods sent to a land far beyond seas, like Alaska, Hawaii or Porto Rico, are exports in the narrowest sense of the word, and within the mischief which our forefathers sought to avert. Hence it seems reasonable to expect that the export trade to our new outlying dominions will be freed from these duties.

There is no prohibition upon the taxation of exports from a territory for local purposes, and if Congress had laid an export tax upon goods about to be shipped from Porto Rico to our ports its legality might have been sustained. It may be suggested that the reasoning applied to exports from our ports into

Porto Rico would apply here also, and that the transference of the place of collection from the point of departure to that of arrival does not change the character of the tax. The duty is objectionable, however, upon another ground. When the tax on exports from Porto Rico is laid here, and to be paid by us, it is unconstitutional because there is no power to tax us for the local purposes of a territory. The invalidity of this provision of the new act seems clear and indisputable.

Into the wisdom and morality of these taxes it is not the province of this article to go. Nor yet shall I consider what bearing any of its arguments may have upon the future of Hawaii, Guam, or the Philippines. Judge Baldwin has suggested that the Supreme Court may yet deprive us, or relieve us, of those islands, by ruling that the Constitution gives to Congress and the Executive no power to annex, either as States, territories, colonies or subject provinces, dominions which are no part of America.[75] The establishment of such a principle would remove one set of questions, and substitute other questions for solution, as to the legal effect of our *de facto* occupancy; but many acts of our officers would be protected by the doctrine that the courts do not decide purely political questions;[76] and Congress could lawfully compensate persons injured by unconstitutional interference in trans-Pacific affairs.[77]

But there is one gross fallacy which should be noticed in closing this discussion, a fallacy which seems widespread, and which is applied to Porto Rico and to Oceanica alike. I refer to the supposition that Congress and the Executive can turn our Republic into an Imperial "world-power" at their discretion because to conquer or buy the earth and rule it in subjection, is an attribute of sovereignty, and because we have no smaller degree of sovereignty than the greatest of European colonizing nations. It is very true that we have every power of sovereignty in the highest degree—that we have power to establish for ourselves the colonial system of Rome or England, the domestic institutions of Spain or Russia, the religion of Thibet or Sulu. But we have not necessarily delegated these powers to our present rulers; and whatever powers we have not delegated to them, or to the State Governments, we have reserved for ourselves.

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[75] 12 Harvard Law Review 409.

[76] Jones v. United States, 137 U. S. 212; In re Cooper, 143 U. S. 503.

[77] United States v. Realty Co., 163 U. S. 427, 432-4, 440.

The Constitution was not made so flexible as to permit of the exercise by government officials, without a new appeal to the people, either of powers expressly denied or of powers neither expressly nor impliedly granted. We, the People, acting in the prescribed form, may tax exports, attaint unpopular politicians, grant titles of nobility, or establish empires in the South Seas. I do not understand that our rulers can do any of these things without consulting us; and if they wish to do them, they must secure the approval of two-thirds of our representatives in each House of Congress, and then secure the assent of at least thirty-four States, either by application to their Legislatures or by direct appeal to their voters; for Congress may call together State Conventions if it pleases. Whenever our rulers are supported by the American people with sufficient unanimity to justify such very grave as well as novel steps as are now being taken, it ought to be possible to obtain an amendment to the Constitution without the slightest delay.

EDWARD B. WHITNEY.